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Dear Sirs,

We are writing in response to the public consultation on the Competition Policy in Hong Kong issued in Nov, 2006:

### 1. Aims of Competition Law

The first question we would like to address is whether Hong Kong needs a new competition law.

Hong Kong has a well-deserved reputation as a free and competitive economy and we appreciate the importance of maintaining Hong Kong's competitiveness. At the same time, however, we believe it is important to emphasize that a competition law provides no panacea. Indeed, some of the problems often referred to in Hong Kong as competition policy problems are in fact challenges intrinsic to Hong Kong being a small city economy.

Hong Kong, however, is the "best example of a laissez-faire economy". The Hong Kong economy is already extremely competitive. The lack of barriers to entry and free trade has made the economy one of the strongest and most enviable in the world.

Would competition laws actually add to the strength of the economy? Competition laws do exist in other jurisdictions and we would not deny that there are obvious advantages in introducing laws which are established practices in major countries. A competition law would reinforce Hong Kong's international image and be seen to impose a level playing field for all players.

However, several international markets, including the European Union, are re-examining the effectiveness of its competition laws.

The EU Commissioner for Competition recently commented that the aim was for markets to work better, not for an abstract notion of "free competition", but because better functioning markets provide consumers with better goods and better services, at better prices. The EU is focusing on the customer welfare standard and their latest thinking is that this should be the standard when enforcing competition laws.

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Since Hong Kong markets are already functioning extremely well, we would argue that we do not need laws to introduce an abstract notion of free competition. The markets already function at a highly competitive level providing customers with better goods and better services at better prices. If the aim of the competition policy has already been achieved, i.e. enhance economic efficiency and free flow of trade providing benefit to customers, there would be no need for any competition law to be introduced.

The introduction of additional laws would place extra administration burden and costs for both the Government and industry. Legal or administrative interference in a well-functioning market would in fact reduce competition, not enhance it. If there are sectors that are proving less competitive, then there would be an argument for introducing sector-specific legislation, such as those already existing in the telecom and broadcasting industries.

## 2. Competition in HK Retail Market

In order to assess the scope of the proposed competition laws we have looked at the competition in the Hong Kong market for the retail industry.

### Market Definition

What actually is the market? There is no clear guidance in the Consultation Paper as to what constitutes a “market” for any particular industry. Other jurisdictions have spent considerable efforts in establishing the market definition to be used for the purposes of interpreting competition laws. **Any competition law is valueless unless there is a clear definition of the market within which competition is defined to occur.** To attempt to draft clear laws in this area is extremely difficult and to enforce such laws even more problematic. In practice this is a minefield and is the subject of many debates even where there is case law and guidelines. The Consultation Paper also mentions the concept of “dominance” but does not attempt to define it.

Assuming we know what “market” we are dissecting, we need to look at the competition in such market.

### Competition

According to the Consumer Council report – Competition:

- (a) depends on ease of market entry and exit,
- (b) depends on availability of sources of supply and outlets for distribution,
- (c) depends on access to information, expertise and financial resources,
- (d) does not depend on the number of participants in the market.

Taking these points in turn for the retail market and, specifically, in relation to supermarkets:

#### 1. Ease of market entry and availability of supply and outlets

- There is no barrier to entry in HK for the retail industry - any company (local or foreign) can set up a retail business in HK and apply for operational licences.

- The market definition in such a small economy is clearly of prime importance. If we consider the retail sale of fresh food, groceries and other products – there are many retail operators in the “market”.

According to an independent market survey (AC Neilson), wet markets have over 75% of the fresh food business. Park’N Shop has a total of 20% of market share of total fresh food and ambient products (which include groceries, drinks and household products but excludes general merchandise). In the fresh food category it only has 11% of the market share.

Each type of goods – fresh food, groceries, drinks and household products sold in a supermarket can be purchased in other shops. In this category alone, HK consumers have a wide choice of retail outlets, e.g.

- Traditional wet markets
- Japanese department stores with a substantial food and household product section
- Discount stores
- Convenience stores
- Chinese provision stores and general household stores
- Health & beauty chains and independent pharmacies

The most logical way to define this “market” is to include any retailer of food, groceries and household goods. It would be a distortion if one considers the “market” to be made up of supermarkets only when the majority of fresh food is purchased in wet markets.

- Easy sourcing and supply of products. There is no difficulty in sourcing all types of products save where fresh food is controlled through Government approved importers, e.g. pork.
- There is availability of retail sites in HK.

## 2. Access to information, expertise and financial sources

- There are no restrictions on the information and expertise required for retail businesses
- Funding is freely available for new entrants or existing operators.

It is clear from the illustration above how critical the definition of the “market” is in any industry and, in particular, the retail industry in such a small and already competitive market.

## 3. Application of proposed Anti-Competitive behaviour in Retail Industry

The Consultation Paper lists a broad category of “restrictive agreements” and “anti-competitive behaviour” including:

- price-fixing
- bid-rigging, market allocation, sales and production
- joint boycotts and quotas
- unfair or discriminatory standards
- abuse of a dominant market position being:

- predatory behaviour, particularly in relation to pricing;
- setting retail price minimum for products or services with no ready substitutes; and
- conditioning the supply of specified products or services to the purchase of other specified products or services or to the acceptance of certain restrictions.

It also proposes possible regulations on mergers and acquisitions.

Hong Kong is a relatively small market and is already highly regulated in terms of protection of the consumer. We do not believe that the industry engages in anti-competitive behaviour such as these mentioned above, nor are they relevant for the retail market. In particular,

Price-fixing – Price changes by one operator triggers immediate reaction from the other competitors in the market. This is standard retail practice worldwide but is particularly prominent in a small economy such as Hong Kong. Competition law would need to distinguish this legislative activity from alleged “dumping” of products. This in fact results in lower prices to consumers, e.g. PNS checks prices every week and changes prices around 200 times per week, resulting in an average 15% price reduction for customers for the same products. Consumer Council’s previous investigations have shown that there is no evidence of collusion on price between the chains, or amongst any other retailers.

Abuse of Dominant Position – “dominant position” is not defined in the Consultation Paper.

Assuming there is a clear definition of “market”, one then needs to consider what constitutes a “dominant position”. Without extensive consideration, any proposed competition law could be applied out of context. Such laws could be used to abuse other competitors.

The fact that consumers have such a wide choice of retailers in Hong Kong means no single player can be regarded as having a dominant position in any “market”. It is clear from the intense competition in HK that the market is functioning extremely well to the benefit of the consumer.

#### RMA Code of Conduct

In addition to a myriad of laws safeguarding consumer interests, the Hong Kong Retail Management Association has a voluntary code of practice applying to all its retail members (including supermarkets). In 2004 the HKRMA further implemented a Self-Regulated Code of Practice to Promote Competition specific to the supermarket sector (Attached). All major supermarket chains have signed compliance with this Code. This Code is in line with UK and Australian practice for supermarkets.

The addition of yet more laws would only further complicate the retail industry and add burden and business costs to an already high retail cost structure in Hong Kong. Such direct and indirect costs (including management time spent in dealing with the issues) will ultimately be passed onto the customer.

#### 4. Mergers and Acquisitions

We would add that the ASW Group has had to obtain competition clearances in a number of jurisdictions when proceeding with acquisitions or disposals. The clearance procedures merely

added a layer of complexity, delay, uncertainty and costs to the transactions, none of which were productive for the seller, the buyer, the business nor its employees. We would observe that competition clearances are deterrents to foreign investment and would not be applicable in a small economy nor ultimately beneficial for Hong Kong.

### Park’N Shop Conclusions

- The HK retail industry, including the food retail market, is already highly competitive. The market is functioning very well. There is no market distortion which would lead to unfair trade in the retail industry in HK.
- A competition law is valueless unless it is clearly defines any market and this is extremely complex in the retail sector.
- The effects of a general competition law will lead to uncertainties, which will be the result of increasing the burden of administration, incur management time and add additional costs to the business leading to higher prices. Such costs will ultimately be passed to consumers.
- Given the self-regulation of the industry by the HKRMA, there is no need to introduce any industry specific rules for the retail industry. This follows the experience in other jurisdictions.
- HK Customers are already benefiting from better choices, low prices and improved services. Park’N Shop does not believe the introduction of competition laws and regulations would benefit the consumer in the retail market. In fact, the regulation of an already well-functioning market would make it bureaucratic, inefficient and costly, ultimately causing harm to the consumer.

Yours faithfully



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